IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1086 OF 2002

Mr. Raghuvansh Dewanchand Bhasin
9/4 Bradys Flats,S.B. Road,
Colaba, Mumbai-400 005 ..Petitioner
V/s
1. The State of Maharashtra

2. Mr. R.R. Joshi,
Inspector of Police (Adm.)
Colaba Police Station, Colaba
Mumbai. ..Respondents

Mr. R.D. Bhasin - petitioner- in-person

Mr.P.S. Hingorani, APP for respondent Nos. 1 and 2.

CORAM : SRI R.M.S. KHANDEPARKAR AND
SRI A.A. SAYED, JJ.
DATE : 26TH NOVEMBER, 2007

ORAL JUDGMENT (PER R.M.S. KHANDEPARKAR, J.)

1. Whether the respondent No.2 could have been arrested the petitioner on the strength of an warrant for arrest which had been already cancelled, and various other connected issues are sought to be raised in the petition.

2. A complaint came to be lodged against the petitioner being C.C. No.163/S/2000 in the

Metropolitan Magistrate, 37th Court Mumbai, by one Mr. Prem Harchandrai which came up for hearing on 7th August, 2002 and on the ground that the petitioner was not present in the Court, a non-bailalble warrant came to be issued against the petitioner making it returnable on 31st October, 2002, and the said non-bailable warrant was forwarded to the Colaba Police station for its execution. However, on 12th August, 2002 the said warrant was cancelled by the learned Magistrate.

3. On 15th August, 2002 the complainant Prem Harchandrai approached the Colaba Police station and insisted for arrest of the petitioner in pursuance of the said warrant. After verifying records at the Colaba Police Station with the help of one Police Constable Mr. Chavan, and on perusal of the said non-bailable arrest warrant bearing No.369 of 2002 issued on 7/8/2002 the respondent No.2 herein, who was the Inspector of Police at Colaba Police station, directed the constable to accompany the complainant Prem Harichandrai and to apprehend and arrest the petitioner. Accordingly, after having identified the

petitioner by the complainant and confirmed by the petitioner himself, he was sought to be arrested by the said constable. On that occasion the petitioner informed the constable as well as the respondent No.2 that the warrant under which he was sought to be arrested had already been cancelled. The respondent No.2 thereupon tried to contact the Public Prosecutor Mr.Tatkare, to enquire as to whether he had knowledge about the cancellation of the said warrant. However, Mr. Tatkare could not give any information in that regard. The petitioner was thereupon detained in the police station for some time and then was produced before the Magistrate at about 2 p.m., thereupon he was ordered to be released.

4. The petitioner procured necessary confirmation about the cancellation of the warrant on the next day and produced the same before the respondent No.2 on 16th August, 2002, a copy of which is found to have been annexed to the petition at Exh. "A". The said Exh. "A" clearly reveals that the warrant which was issued on 7th August, 2002 against the petitioner in Criminal case No. 163/S/2000 was cancelled on 12th

August, 2002.

5. In the background of above facts, the first point which is sought to be raised by the petitioner is whether the trial Court was justified in issuing non-bailable warrant against the petitioner merely because the petitioner had failed to appear in the Court on 7th August, 2002 in relation to the criminal case against him.

6. The power and jurisdiction of the Court to issue appropriate warrant against an accused on his failure to attend the Court on the date of hearing of the matter cannot be disputed. However, such a power has to be exercised judiciously and not arbitrarily. In case, the accused fails to remain present on the date of hearing of the matter, who had been previously either directed or called upon to remain present, certainly a warrant can be issued to secure his presence, as the absence of accused in such circumstances could per se reveal reluctance on his part to extend the required and expected cooperation to the Court in speedy disposal of the matter.

However, it cannot be said that merely because the accused fails to remain present on any particular date of hearing of a criminal case, issuance of non-bailable warrant without ascertaining cause for his absence could be said to be an act with judicious exercise of such power.

7. There could be various reasons for the absence of the accused on the particular date of hearing of the matter. It could be for the reasons beyond his control that he might remain absent for the hearing. This could be known only when the accused appears before the court and tenders his explanation for his absence. For that purpose it is not necessary to issue non-bailable warrant. In order to ensure his presence, a bailable warrant in such circumstances can certainly be appreciated. Besides the Courts have to ascertain whether the accused is such a person, who can be said to be of a character which is of such a nature that he is a chronic absentee or a person who has no respect for the Court’s order or Court’s process.

8. In case of absence of advocate, who happens to be an accused person, it can hardly be believed that advocate would not know the consequences of his absence in the Court, when he is facing the criminal case against him. Certainly in such a case at first instance it would be appropriate for the Court to issue mere notice to the advocate to appear before the Court and to ascertain the reason for his absence in case he remains absent without prior leave in that regard. Similar approach can be in cases of educated person, who is expected to know the consequences of his absence. By no stretch of imagination it can be said that Court would be justified in presuming that accused would remain absent without any justification. The Court has also to take into consideration the traffic problems those are faced in the metropolitan city like Mumbai. Mere issuing non-bailable warrant in such circumstances without considering all the aspects would not be a judicious exercise of such powers.

9. The petitioner is justified in contending about absence of need for issuance of N.B.W. in the case

in hand since it was an undisputed fact apparent from record that the accused in this case is an Advocate, there was no past record of his absence or reluctance to render the necessary assistance to the Court in disposing of the matter, nor the record could disclose the petitioner to be harden criminal or a person of such a nature that unless the non-bailable warrant was issued his presence could not have been secured. In these circumstances, we are in entire agreement with the petitioner when he submitted that non-bailable warrant in the facts and circumstance of the case was not justified at all.

10. The next point which is sought to be raised by the petitioner is that when the police authorities were informed by him that the warrant issued against him has already been cancelled, whether the police were justified in executing the warrant and arresting the petitioner.

11. Undoubtedly, when the petitioner informed the police authorities that the warrant in question had already been cancelled the petitioner was not armed

with any documentary proof in that regard. Nevertheless, the police officer to whom it was informed that the warrant had been cancelled, did try to ascertain from the concerned APP as to whether such warrant had been cancelled. The complaint was filed in relation to the offence punishable under section 324 of Indian Penal Code. The complaint related to the year 2000. At the relevant time, the offence punishable under section 324 IPC was bailable offence. It was made non-bailable pursuant to the amendment brought to the Code of Criminal Procedure (Amendment) Act 2005 (F) (25 of 2005) and particularly under section 42(F) (PS). Obviously, therefore, it was to the knowledge of the respondent No.2, who was of the rank of Police Inspector that the offence for which the prosecution has been launched was a bailable offence though was cognizable. It was also to the knowledge of the concerned police officer that warrant was merely on account of failure on the part of the petitioner to attend the court on 7th August, 2002, and it was returnable on 31st October, 2002. Undoubtedly once the warrant is issued it is the duty of the police

officer to execute the warrant as expeditiously as possible. But one fails to understand the urgency which was shown in executing such warrant on a holiday. Besides the facts disclosed in the affidavit by the Police Inspector clearly revealed that only upon the insistence of the complainant, it was sought to be executed on holiday and this is apparent from the affidavit filed by the respondent No.2 himself. In para 4 of his affidavit he has categorically stated that it was the complainant, who requested him to execute the said warrant expeditiously and consequent thereupon he searched the records and directed the constable to execute the warrant by arresting the petitioner.

12. It was 15th August, 2002, and being a holiday, obliviously, it was not possible for the petitioner to have the documentary proof of cancellation of the warrant on 15th August, 2002 itself. In those circumstances, and as the complainant had approached the police authorities only on 15th August, 2002, which was a holiday and was insisting the execution of the warrant in spite of the fact that the

petitioner had informed the police officer that the warrant had been cancelled, it was certainly expected from the police officer to ascertain whether the warrant had been really cancelled or not before executing such warrant on holiday. In the facts and circumstances of the case, therefore, the grievance of the petitioner that there was some sort of collusion between the police authorities and the complainant, cannot be totally ruled out in the matter of arrest of the petitioner. Undoubtedly, there is no clear evidence in that regard, however, it creates strong suspicion about the genuineness and bonafide on the part of the police to execute the warrant on holiday in spite of petitioner insistence that the said warrant had already been cancelled.

13. It is pertinent to note that the petitioner appears to have been arrested in a public place, in a public view, while he was at Radio Club at Colaba. Undoubtedly, there is no clear evidence in that regard before us but the facts and circumstances in which and the manner in which the petitioner came to be arrested, we have no hesitation in accepting the

contention in that regard raised by the petitioner. One fails to understand the purpose and reason behind the arrest in public place. Certainly the petitioner could have been asked to approach the police station on 16th August, 2002. It is not the case of the respondent that the petitioner had been in habit of flouting the orders of the Court or the directions issued by the police authorities. Undoubtedly he was a practicing lawyer.

14. The petitioner then has sought to raise a point as to whether the Courts can at all issue any warrant called a non-bailable warrant. According to the petitioner, no such terminology is to be found in the Code of Criminal Procedure and in that regard attention was sought to drawn to Sections 70 and 71 of Cr.P.C., as well as to Form No.II of the Second Schedule of the Code.

15. Section 70 (1) provides that every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court,

sub-section (2) provides that every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Section 71 (1) provides that any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court the officer to whom the warrant is directed shall take such security and shall release such person from custody. Sub-section (2) provides that the endorsement shall state - (a) the number of sureties; (b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; (c) the time at which he is to attend before the Court. Sub-section (3) states that whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

16. Form No.II in the Second Schedule reads thus:-

WARRANT OF ARREST

(See Section 70)

. To.....(name and designation of the person or persons who is or are to execute the warrant).

. Whereas (name of accused) of (address) stands charged with the offence of .....(state the offence), you are hereby directed to arrest the said.....and to produce him before me. Herein fail not. Dated this.....day of.....,2

(Seal of the Court) (Signature)

This warrant may be endorsed as follows:-

. If the said .....shall give bail himself in the sum of Rupees.....with one surety in the sum of rupees.....(or two sureties each in the sum of rupees.....) to attend before me on the .....day of.....and to continue so to attend until otherwise directed by me, he may be released.

Dated, this.....day of.....20...

(Seal of the Court) (Signature)

17. The contention of the petitioner is that neither sections 70 nor section 71 nor the form provides for any expression like non-bailable warrant. Even sub-section (2) of section 71 provides for the endorsements to be made on the warrant but it nowhere provides any endorsement like "non-bailable"

18. Section 70 neither speaks of bailable warrant nor non-bailable warrant, it merely speak of warrant of arrest. Section 71 speaks of discretionary power of the Court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under section 70 Cr.P.C. Sub-section (2) of section 71 Cr.P.C. enumerates the endorsements which can be made on an warrant. It cannot be disputed that all these sections and the form do not use the expression like "non-bailable". However, said expression is used to facilitate the authorities

seeking to execute the warrant as well as the person against whom the warrant is sought to be executed to make them aware as to the nature of the warrant that has been issued. Merely because form under the Second schedule nowhere uses the expression bailable or non-bailable warrant, that does not prohibit the Courts from using the word or expression while issuing the warrant or even to make endorsement to that effect on the warrant so issued. Any expression which is made on such warrant for the benefit of the person against whom the warrant is issued or the persons who are required to execute the warrant would not render the warrant to be bad in law. What is material is that there is a power vested in the Court to issue the warrant and that power is to be exercised judiciously depending upon the facts and circumstances of each case. Being so, merely because the warrant discloses the expression like ’non-bailable’ and that such terminology is not to be found in sections 70 or 71 Cr.P.C. that itself cannot render the warrant issued against any person to be bad in law. The argument in this regard is devoid of substance.

19. In the facts and circumstances as narrated above, we therefore, find that there was no justification for issuance of non-bailable warrant on 7th August, 2002 merely because the petitioner had remained absent in Criminal Case No.163/S/2000 by the Metropolitan Magistrate. The Magistrate could have issued either a notice or a bailable warrant depending upon the facts revealed from the records. Once the warrant was cancelled on 12th August, 2002, it was necessary for the Court to immediately communicate the same to the concerned Police authority so that no inconvenience could have been caused to the person against whom the warrant was initially issued. Once the warrant was sought to be executed on holiday and the concerned police officer was categorically informed that the warrant had already been cancelled and the police officer being fully aware of the circumstances and nature of the case in which warrant had been issued, it was necessary for the police officer to ascertain and to find out whether the warrant which was sought to be executed was still enforceable or had already been

cancelled and not to rush to execute the warrant in those circumstances and that too on a holiday. Having produced the necessary documents confirming the cancellation of the warrant much prior to the date on which it was sought to enforced, it was the duty of the police officer to tender the necessary apology to the petitioner for executing such warrant on the holiday, and the concerned officer having failed to tender the apology it apparently shows that he had not performed his duty in the manner he was required to perform as a responsible police officer. Even the affidavit filed by the respondent No.2 nowhere discloses any repentance for having executed the warrant which was already cancelled. It is a clear case of unnecessary interference with the liberty of a citizen.

20. The Apex Court recently in the matter of **Inder Mohan Goswami & Anr. V. State of Uttaranchal & Ors**., reported in 2007 AIR SCW 6679 has held as under:-

> "Personal liberty and the interest of the State.
>
> 49. Civilised countries have recognized that

liberty is the most precious of all the human rights. The American Declaration of Independence 1976, French Declaration of the rights of Men and the Citizen 1789. Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice- liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.

50. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

51. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants would be issued.

When non-bailable warrants should be issued.

52. Non-bailable warrant should be issued to bring a person to Court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

. it is reasonable to believe that the person will not voluntarily appear in Court; or

. the police authorities are unable to find the person to serve him with a summon; or

. it is considered that the person could harm someone if not placed into custody

immediately.

53. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

54. In complaint case, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceedings intentionally, the process of issuance of the non-bailable warrant should be restored to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

55. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any strait-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

56. The court should try to maintain proper balance between individual liberty and the

> interest of the public and the State while issuing non-bailable warrant."

21. The law on the point of issuance of non-bailable warrant stands well settled by the above referred decision of the Apex Court, and calls for no further elaboration by this Court.

22. In the facts and circumstances, while making rule absolute in above terms, we consider it appropriate to direct the respondent No.2 to pay costs of Rs. 2000/- from his own account to the petitioner in the case in hand. Rule is accordingly made absolute.

(R.M.S.KHANDEPARKAR,J)

(A.A. SAYED, J.)